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No. 91-1572

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

JOSEPH ASH,

Petitioner

v.

STERNWEST CORP.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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I. THE ISSUE IS CONSTITUTIONAL ACCESS TO SOME COURT WHEN A STATE COURT VIOLATES PRECEPTS OF DUE PROCESS GUARANTEES, AND THE PEOPLE HAVE NO WHERE ELSE TO TURN

A. DUE PROCESS HEARING IS A RIGHT, NOT SUBJECT TO "DISCRETION" AS HAS OCCURRED HEREIN

This Reply is being written after the city around us has been torched and looted, partially sparked by frustrations of people who believe the judicial system does not reflect justice or the real world.

The timing is uncanny, bearing relevance to the issues at bar- access to some court when due process is denied.

In fact, this brief was at the printers on Vermont Ave. when that print shop burned to the ground. Being forced to re-write this brief now allows us to illustrate what was a merely academic argument before.

For this case involves access to some court system, state or otherwise, when the system fails. When an appeal judge goes beyond his jurisdiction (makes an original

order on an issue which was final and not appealed, not before the court, not briefed, later found to contrary to substantive law) and deprives the litigant of his property without any due process.

Due process is a Constitutional guarantee. Contrary to Respondent, this is not merely a question of state law adjudication.

And although Respondent argues that Petitioner's arguments regarding this were later adjudicated and rejected by numerous courts, the truth is that the only means of review was by "discretionary review."

And no discretionary review or hearing was ever afforded. Petitions to recall the remittitur (mandate) were denied without comment. No adjudication on the merits or legality of these matters has occurred.[1/]

[1/] Further, Stern's emphasized statement that Ash actually litigated the propriety of the **Civil Code** (CC) **§1717** attorney's fees awarded in the appeal before Justice George is false and misleading.

FOOTNOTE 1 CONTINUED NEXT PAGE

B. THERE WAS NEVER ANY DUE PROCESS ADJUDICATION IN THIS CASE

Despite Respondent's attempts to belittle this appeal, and mischaracterize the facts, issues, and law, we cannot think of a more pressing issue now before the U.S. Supreme Court in light of the turmoil in this country (resulting from people's belief that they have no legal recourse when the Calif. state judicial system fails).

For what happens when a state court justice acts performs an arbitrarily and unlawful original act, in direct violation of Constitutional due process, and a

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FOOTNOTE 1 CONTINUED

Stern never asked for CC §1717 fees in its brief. Stern only asked for fees under **Rule 26, Calif. Rules of Court.** Ash replied that Rule 26 does not permit attorney's fees (**Cuesta v Superior Court** (1984) 152 CA3d 945, 950, 200 CR 1, **Visini v Visini** (1963) 212 CA2d 183, 191, 192, 27 CR 782), except for frivolous appeal.

The Court of Appeal did not find the appeal frivolous nor award fees under Rule 26. It awarded them under CC §1717, which was neither requested nor briefed, and later legal research showed is prohibited.

litigant is denied any forum to complain to?[2/]

This case appears tainted with political considerations.[3/]

2/ See quote from **Robinson v Ariyoshi** (9th Cir 1985) 753 F2d 1468, at page 28 of our Petition: "we are concerned that such a result might deprive plaintiffs of any forum, state or federal . ."

3/ Appellate Justice George, who rendered the order, was subsequently appointed to the state Supreme Court. And the state Supreme Court, the only state means of review, thereafter rejected all attempts to obtain discretionary review.

When Ash then sought injunctive relief in the federal courts for violation of Constitutional due process, the courts refused to address the merits, stating this was a state court matter only and suggesting Appellant take it back there, which he did.

Ash's motion in the state trial court that it not follow the appellate order for an award against him, because the order was void as violating the Constitution, was met with a refusal to adjudicate the matter.

That trial judge, (who was in contention for and was subsequently elevated to an Appellate Justice) stated that though the appellate order might be (and appeared to be) in violation of law, she would not question the order of the Justice.

When that order was appealed, the state Court of Appeal refused to look into the merits, despite the fact that it was void and never briefed, stating that Appellate Justice (now Supreme Justice) George's decision was "law of the case."

In essence, Ash never received any due process hearing, (and Respondent cannot document any except to argue that summary denials of applications for discretionary hearings is "adjudication").

It appears that expediency or politics considerations may have overruled Constitutional guarantees (and state substantive law which prohibited any award against Ash).

C. HAVE THE STATUTES PROVIDING FOR FEDERAL COURT INTERVENTION FOR CONSTITUTIONAL STATE COURT VIOLATIONS BEEN ABROGATED?

When confronted with political judicial bias resulting in due process denial, one looks to the federal court system.

28 USC 1343(3) and 42 USC 1983 were specifically enacted to permit access to the federal courts when the state courts failed.

Pages 22-34 of the present Petition outline various federal cases which uphold U.S. District Court intervention when Constitutional guarantees are violated in

civil cases. However, the Ninth Circuit held, in this case, that **Dist. of Columbia Court of Appeal v Feldman** (1983) 460 US 462, 103 S.Ct. 1303, has now closed the door to federal remedies of such state court violations, in essence abrogating due process in some cases.

In the present insurrection in Los Angeles, stemming **inter alia** from the acquittal in the Rodney King state court beating trial, the U.S. attorney immediately moved to establish possible federal civil rights violations under these statutes. So what is the difference?[4/]

Indeed, in Rodney King, a **trial actually**

4/ Coincidentally, the very state Appellate Court and justices whose order is now on review are the same justices who orders transferred the Rodney King trial out of Los Angeles to conservative Simi Valley, and who upheld a sentence of five years probation for the killing of a black teenager at a grocery store. Both judicial decisions sparked the L.A. riot.

occurred. In the case at bar, deprivation occurred without any due process. In fact, that deprivation occurred in violation of state statutes which prohibit the very appellate order which was made, precisely because there was no due process briefing.

What we are saying is that too often judicial decisions are made which are divorced from existing reality.

Arbitrarily making a decision, and then judicially "deeming" it correct or "adjudicated" when it is not, because of ego or political considerations, does not set the matter at rest.[5/]

5/ The public does tolerate occasional judicial errors. But widespread frustration from a belief of unfairness or lack of due process merely adds under the surface to a "San Andreas" like pressure.

The Petitioner's family is well aware of the consequences. For several days now, one of its members, who puts out a local newspaper, has extensively covered the insurrection and talked with its participants. One of the Ash buildings was directly threatened with arson in the riot (and was even torched years ago).

The matter is finally before this Court.

It can clarify **Feldman** and rule that U.S. District Courts have always been open to enjoin Constitutional violations which were not addressed in state courts; that a lucky rare U.S. Supreme Court discretionary hearing each time is not the only means to sue for due process denial.

Or it can order the state court hear and "adjudicate" the matter, not rely on the non-applicable excuse of "law of the case."

Or it can do nothing. Ash has patiently endured years of litigation in seeking relief by judicial means, all the while being taunted by Respondent with cries of "litigious" and "frivolous," despite the fact that it is Ash who was sued and won.

We can only hope that every future litigant will be as patient and tolerant when state court judges trample on their Constitutional guarantees, with no redress.

We suspect that is an unreal hope.

III. ALL ISSUES ARE NOW BEFORE THIS COURT BECAUSE ASH HAS LOGICALLY FOLLOWED ALL COURT DIRECTIONS, WHICH HAVE CULMINATED IN THIS PETITION

A. THIS HAS BEEN ONE LONG CONTINUOUS LITIGATION, NOT SEPARATE ONES

Respondent argues that the issue of due process and the right to seek redress in the U.S. District Court is precluded from appeal because that is a separate action.

Not so. This has been one long continuous adjudication of one issue since the Justice George decision to the present.[6/]

6/ Stern also argues Ash is litigious because the case has dragged on so long.

What it fails to mention is that it is Stern which sued Ash, and lost, after many years of litigation, and was ordered to pay the fees of Ash's defense. Now that Ash is challenging an order regarding those fees, Stern is bootstrapping on the length of the very litigation it brought and lost, in order to defeat that challenge.

Ash has aggressively pursued this challenge, despite hardships caused by the delays of Stern and the judicial system. He cannot be prejudiced for this.

Furthermore, justice is not measured by time, as long as rights are not sat upon. It took 17 1/2 years for two incarcerated inmates to recently prove their innocence in Los Angeles, and their appeals and challenges were not ongoing as Ash's are.

For Ash has continually sought a hearing on J. George's decision without success.

And the federal court referred it back to the state court. To have appealed to the U.S. Supreme Court at that time would have been futile, as long as there was any state relief possible as suggested by the federal court. It would also violate the policy against "piecemeal litigation."[7/]

7/ "It is agreed that the purpose of the final judgment rule is to prevent piecemeal appeals and to allow trial courts to correct their errors before harm is done.

"Perhaps the simplest definition is that a decision is final when it terminates litigation on the merits, leaving nothing to be done but to enforce what has been determined. **Parr v United States** (1956) 351 US 513." **Lavine & Horning, Supplement to Manual of Federal Practice**, §8.3.

We also note that on the one hand Stern complains about reference to the federal appellate decisions in this petition, and yet on the other hand brings in, for emotional appeal, Ash's malicious prosecution action, which is irrelevant.

(On this point, we note that though that malicious prosecution action was dismissed, it was done for failure to serve within two years, and is still on appeal and on the grounds that collateral action was ordered stayed by a trial judge pending final adjudication of this present action).

Now that the state appeal court has refused to adjudicate the matter, thus resulting in denial of Constitutional due process, the logical step would be to file for injunctive relief in the U.S. District Court. However, that Court and the Ninth Circuit have already ruled that this is precluded, and that relief in the state court, creating a "Catch 22" situation.

B. UNDER RESPONDENT'S LOGIC, THERE COULD NEVER BE ANY DUE PROCESS HEREIN

If one were to accept Stern's argument, then what has occurred is a "de facto conspiracy" to deny due process. The state court will not hear it. The federal court said it could still be heard by the state.

But the state court again refused, even on direct appeal. The federal court already said it will not hear it, and even threatening sanctions the first time.

But Stern now says even the U.S. Supreme Court cannot rule a forum, thus deepening

the due process denial.

There is something very un-American about any judiciary which would deprive a litigant of any recourse, state or federal, to review an act which erroneously deprives a person of his property without so much as a briefing and in violation of Constitutional due process, just because that judge was an appellate judge rather than a trial judge.

The recourse has always the federal courts and the federal statutes. We do not believe that **District of Columbia Court of Appeal v Feldman** (1983) 460 US 462, 103 S.Ct. 1303, took away that basic right.

For if this is so, as the federal court stated in this case, the judicial "safety valve" has been closed, only adding to the potential pressure which occurs when people believe the judiciary provides no recourse.

Is federal relief from Constitutional due process violations by the state court only available for deprivation of freedom

via the habeas corpus process, but denied if one is deprived of his property?

IV. A REVIEW OF THE FACTS OF THIS CASE SHOW THAT THE ISSUE IS LACK OF OF DUE PROCESS JURISDICTION

With Respondents's Opposition Brief, our Petition may be a little confusing as to what orders and issues are on review.

This petition involves the question of Constitutional Due Process under the 5th and 14th Amendments. This single issue of Due Process has been bandied back and forth from the state court to the U.S. District Court and Ninth Circuit Court of Appeals and back again, upon suggestion of the federal court, for adjudication by the state court, which upon proper appeal refused to adjudicate it.

ASH WAS SUED, WON, BUT AN APPELLATE JUDGE THEN WENT FAR AFIELD OF HIS JURISDICTION

Petitioner Ash was sued and prevailed after years of what the Court of Appeal stated was "difficult and complex litigation," and was found entitled to

reimbursement of his attorney's fees.

Upon Ash's appeal from inadequacy of those fees, Calif. Appellate Justice Kingsley in a published decision, ordered enhancements and pre-judgment interest (Appendix Exhibit [AE] "C").

When the trial court erred in merely ordering 10% interest per annum from April 1985 (the date of judgment of dismissal), which the Court Clerk automatically adds as statutory post-judgment interest without necessity of court order, Ash appealed.

Ash specifically limited his appeal "TO THE EXTENT THAT NO INTEREST IS APPLIED OR AWARDED FOR PERIODS **PRIOR** TO APRIL 11, 1985.

Upon Justice Kingsley's retirement, Justice George, new both to the Appeal Court and to civil litigation (having been a criminal judge) held that pre-judgment interest had been properly awarded (AE "D").

However, **Justice George decision went far beyond misunderstanding of the issue in**

front of him. He then **reduced** the April 1985 10% interest (which was automatic statutory 10% interest) to 7%.[8, 9/]

This was a matter which was not in front of the Appeal Court. All post-April 1985 interest was **excluded from appeal and final.**[9/]

Thus Justice George had no jurisdiction over this matter; he exceeded Constitution-

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[8/] Subsequent declarations by the Superior Court Clerks in charge of computing post-judgment interest for the last 23 years state that Justice George's assumptions and understanding of pre versus post-judgment interest was entirely wrong [Appendix "E"].

Note also that **Jones v World Life Research** (1976) 60 CA3d 836, 131 CR 674, holds that improper calculation of post-judgment interest is a **void** decision, not merely an erroneous one.

[9/] Contrary to Stern's statement at page 18, the post April 1985 interest rate was **not** specifically placed in controversy nor did Ash request that the interest rate be modified upward from 10% to 18%.

Post April 1985 interest was automatic 10% post-judgment interest, and Ash did not appeal from this. He only appealed from denial of interest for periods **prior** to April 1985, of which no interest had been awarded, and requested such pre-April 1985 pre-judgment interest should be set at 18%, the contract rate, when it was awarded.

al due process; it was not even briefed.[10/]

[10/] **Witkin, Cal. Procedure,** Appeal §153:

"Rule 1 of the Rules on Appeal refers to an appeal from a judgment or a 'particular part thereof," and it is the settled rule that a party may appeal from **part** of a severable judgment. (Emphasis in original). The effect of such an appeal is that only the part appealed from is brought up for review.

"**The rest of the judgment becomes final, the appeal court has no jurisdiction to review it, . .**" (**Whalen v Smith** (1912) 163 C 360, 125 P 904; **Ganahl Lumber Co. v Weinsveig** (1914) 168 C 664, 667, 143 P 1025; **Lake v Superior Court** (1921) 187 C 116, 119, 200 P 1041; **Glassco v El Sereno Country Club** (1932) 217 C 90, 17 P2d 703 [language of notice of appeal held determinative]."

In **Blum v San Francisco** (1962) 200 CA2d 642, 19 CR 574, litigant recovered judgment but was denied pre-judgment interest for a specified period of time, and appealed from said denial. Respondents argued that the appeal opened the door "to consideration of the correctness of the other matter from which no appeal was taken."

No said the Court, an appeal from denial of interest for "a specified period of time" does not affect the other part of the judgment, and so is severable; "ALL OTHER MATTERS DETERMINED DETERMINED BY THE JUDGMENT ARE FINALLY ADJUDGED."

See also **Estate of Hubbel** (1932) 216 C 547, 15 P2d 503 (cited in **Blum**) permitting an appeal for more interest without affecting the finality of the rest of the judgment.

Justice George then went even further in due process denial. **Without affording any briefing or hearing on the matter, and stating he was "aware of no authority addressing the somewhat unusual circumstances of this case,"** he ordered attorney fees (some $20,000) to Stern as "prevailing party" (AE "D" page 17).

A mandatory rehearing was denied upon timely petition (Ash trying to state that there was authority prohibiting such award as well as addressing the matter of jurisdiction over issues excluded from appeal).[11/]

11/ Violation of due process or excess of jurisdiction (i.e. rendering orders on matters not on appeal) is always a void order. However, even an award of costs (after hearing) where such costs is not allowed is a void order under Calif. law.

At page 18, Stern cites **Wells Fargo v San Francisco** (1944) 25 C2d 37, 152 P2d 625, as "holding that an erroneous award of costs is not beyond the jurisdiction of the court and is not a void order." That case does not stand for that nor has anything to do with erroneous cost awards.

The operative case is the Supreme Court case of **Abelleira v Dist. Court of Appeal**

FOOTNOTE 11 CONTINUED NEXT PAGE

A timely petition to the state Supreme Court was summarily denied.

Contrary to law, Stern states this denial was "adjudication."[12/]

FOOTNOTE 11 CONTINUED

(1941) 17 C2d 280, 289, 109 P2d 942, which held that a court "cannot award costs in a situation not provided by statute. **Michel v Williams** (1936) 13 CA2d 198, 576 P2d 546," is **void**, and can be collaterally attacked.

Michel: "The Court was without authority to enter (such) a judgment for costs."

Jones v World Life Research Institute (1976) 60 CA3d 836, 131 CR 674, which Stern argues is not applicable, specifically examined **both Wells Fargo** and **Abelleira**.

Jones concluded that the Calif. Supreme Court had declared that a judgment for costs where such costs were not allowed is **void**, and further that improper calculation of interest was a **void** order.

12/As stated in **Cal Rules of Court, Rule 28 Advisory Committee Comment**: "It has long been established in Cal. law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. (**E.g. People v Davis** (1905) 147 Cal.346, 350; **People v Triggs** (1978) 8 Cal.3d 884, 890-91). Adoption of the new "review" procedure does not affect this legal doctrine, and denial of review will not be an expres-sion of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion.

THE FEDERAL COURT REFUSED TO HEAR THE MATTER

Ash then sued for injunctive relief (not damages) in U.S. District Court for denial of Constitutional due process. The court dismissed for lack of jurisdiction, referring the matter back to the state court, and the 9th Circuit affirmed (Appendix "B").

Following the federal decision, Ash moved the state trial court to examine whether J. George's order was void, and to strike Stern's $20,000 claim. The trial court refused to adjudicate it.[13/]

13/ The trial judge (in contention for appellate justice) refused, stating "I am not going to hear argument on it. . I will not disregard an order of the court of appeal. He (Ash's attorney) can cite authority to me until the cows come home." (Appeal #B042634 Reporter's Transcript [RT] page 3).

The trial judge also based her decision on the fact that the state supreme court refused to review the case (though they refuse to review virtually any civil case these days). She stated, contrary to the law in footnote 12, that if the Court of Appeal was wrong, then the supreme court "will certainly tell them that. . it's a hint that they weren't offended by anything that happened in this case." (#B042634 RT p. 10).

THE STATE COURT STILL REFUSED ADJUDICATION

Appeal #B042634 was taken from that trial judge's order. But the state court of appeal refused to look it, stating that J. George's previous order was "law of the case." It (Appendix "A") is now before this Court, allowing review of this entire matter following exhaustion of all other remedies.

Ash went to all courts, as directed, and has been turned away without so much as a hearing. Thus the issue is what does he do.

If both the federal and state courts refused due process, this Court should direct some hearing to some court.

This has been one continuous case, which has ripened to the point that for the first time, review is proper before this Court, and encompass all the Constitutional issues which form the basis of this case.

Respectfully submitted,

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